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IN THE

Supreme Court of The United States

OCTOBER TERM, 1983

ALPHA OTIS O'DANIEL STEPHENS,

Petitioner,

v.

RALPH KEMP, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR REMAND TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR REMAND TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REASONS FOR GRANTING THE WRIT

Introduction

The state's opposition to Stephens' petition for writ of certiorari does not attempt to rebut Stephens' demonstration that the decisions below deprived him of his constitutional rights in contradiction of prior decisions by this Court and by other circuits. Instead, the state merely restates arguments it presented in its unsuccessful motion to vacate this Court's stay of Stephens' execution.[1] As recent cases before this Court and the circuit courts indicate, the issues as to which Stephens seeks certiorari, including the manner in which his

[1] The state again makes unsupported assertions that Stephens failed to proffer evidence at state and federal habeas hearings. However, in his Memorandum in Opposition to Respondent's Application for Reconsideration and Vacation of This Court's Order Staying Stephens' Execution, dated February 7, 1984, which has been previously filed with this Court, Stephens demonstrated that he never received an evidentiary hearing or an opportunity for discovery in either his state or federal habeas actions, and that he sufficiently profferred the evidence he would have presented had he been accorded a hearing.

habeas petition was dismissed without an evidentiary hearing, the conflicting standards applied in abuse of the writ cases, the Eleventh Circuit's virtually insurmountable "culpable admissions" barrier to ineffective assistance claims, the conflicting interpretations of *Enmund* v. *Florida*, 458 U.S. 782 (1982),[2] and questions of racial discrimination in sentencing, are of critical importance to death-sentenced habeas corpus petitioners and warrant further review by this Court.

ARGUMENT

Point I

THIS COURT SHOULD ORDER A REMAND BECAUSE THE ELEVENTH CIRCUIT'S "CULPABLE ADMISSIONS" REQUIREMENT WRONGLY DEPRIVED STEPHENS OF AN EVIDENTIARY HEARING ON HIS INEFFECTIVE ASSISTANCE CLAIM

In support of his request for a remand, Stephens respectfully directs this Court's attention to the most anomalous and contradictory portion of the lower courts' decisions—their refusal to require an evidentiary hearing on his ineffective assistance of counsel claim because he could not proffer "culpable admissions" by his trial counsel of their own ineffectiveness.

The Eleventh Circuit, however, would preclude review of Stephens' meritorious claims because he has not obtained the voluntary cooperation of his attorneys, who failed to investigate, and who never discovered evidence that, for example, would have proven that the murder could not have occurred as described at trial by the interrogating officer. Yet it was

[2] *See, e.g., Garcia* v. *Illinois*, U.S. , 52 U.S.L.W. 3918 (June 25, 1984) (Marshall & Brennan, J.J., dissenting from a denial of certiorari) (certiorari should be granted to consider whether an appellate court can properly make a finding of intent to kill when jury verdict is ambiguous); *Reddix* v. *Thigpen*, 732 F.2d 494 (5th Cir. 1984) (modifying its decision to state that an ambiguous jury verdict necessitates a retrial even when the evidence is sufficient to support an intent to kill); *Ross* v. *Hopper*, 716 F.2d 1528 (11th Cir. 1983), *reh'g en banc granted*, 729 F.2d 1293 (11th Cir. 1984) (impact of ambiguous jury verdict to be reviewed).

impossible for Stephens to have presented the testimony of recalcitrant prior counsel because the district court denied his motions for an evidentiary hearing and leave to take discovery.

Stephens should not be barred from raising this ineffective assistance claim solely because his trial counsel, who could not perceive or would not admit their own failings, refused even to discuss their representation with present habeas counsel. Regardless of prior counsel's evaluation of their professional services, Stephens is entitled to a judicial evaluation of his ineffective assistance claim, both as it rebuts the state's abuse of the writ allegations and as it stands as an independent ground for habeas relief.

Subsequent to the filing by Stephens of his petition for writ of certiorari, this Court in *Strickland* v. *Washington*, U.S. , 104 S. Ct. 2052 (1984), established the standard for determining whether counsel's representation at trial was so ineffective that the conviction or sentence should be set aside. Stephens' petition, however, raises an issue not resolved by *Washington*: Must a habeas petitioner proffer affidavits or testimony of counsel admitting ineffectiveness as a precondition to an evidentiary hearing on a sixth amendment claim? Because the Eleventh Circuit imposed such an unreasonable procedural barrier on Stephens, he has never had the opportunity to present the facts necessary to establish his ineffective assistance claim.

Stephens respectfully requests that this Court grant certiorari to reverse the imposition of this unreasonable and erroneous burden and to remand this petition to the Eleventh Circuit with instructions that Stephens be granted leave to take discovery and an evidentiary hearing. 28 U.S.C. § 2106[3].

[3] *See Burger* v. *Zant*, U.S. , 104 S. Ct. 2652 (1984); *Johnson* v. *Bennett*, 393 U.S. 253 (1968); *Garner* v. *Yeager*, 389 U.S. 86 (1967); *In re Shuttlesworth*, 369 U.S. 35 (1962); *cf. Autry* v. *Estelle*, 719 F.2d 1251, 1252 (5th Cir. 1983) ("On our own motion and to afford a death sentenced prisoner every opportunity, consistent with the interests of the state, to present his constitutional claims, we remand this case to the district court for a full and complete evidentiary hearing").

A hearing to determine the facts relevant to Stephens' ineffective assistance claim, coupled with the proper standard for evaluating that claim, as set forth for the first time by *Washington,* will allow the district court finally to assess the merits of Stephens' as yet unaddressed ineffective assistance claim, as well as the merits of his other substantive claims.

Point II

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE VIRTUALLY IDENTICAL CLAIMS OF ARBITRARY AND RACIALLY DISCRIMINATORY APPLICATION OF THE GEORGIA DEATH PENALTY RAISED BY STEPHENS AND THREE OTHER GEORGIA HABEAS PETITIONERS

This Court's decision in *Gregg* v. *Georgia,* 428 U.S. 153, 187 (1976) (Stewart, Powell & Stevens, J.J., concurring), is premised on the assumption that Georgia's death penalty statute would remove arbitrary, freakish, and discriminatory factors from the decision to impose death. In Alpha Stephens' case, that assumption is false.

Stephens, in his current habeas petition, proferred to the district court a complex, recently available statistical study, the Baldus Study, to demonstrate that the Georgia death penalty is disproportionately imposed on defendants who, like Stephens, are black and stand accused of murdering white victims.[4] Indeed the Baldus Study shows that the race of the victim is virtually as predictive of whether a death sentence will be imposed as the statutory aggravating circumstance that the defendant was an escapee, a fact relied upon in the imposition of the death sentence against Stephens. He was denied an opportunity to present the Baldus Study and related anecdotal evidence in a hearing before the district court.[5]

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[4] The proffer included the trial record in *McCleskey* v. *Zant*, 580 F. Supp. 338 (N.D. Ga.), *hearing en banc granted*, 729 F.2d 1293 (11th Cir. 1984), consisting of over 1,000 pages of transcript and several file drawers of exhibits.

[5] Stephens could have supplemented the statistical evidence with anecdotal evidence of the improper role of race in his own trial. For example, although a properly applied death penalty statute presupposes that "the day is past when juries do not represent the minority group elements of the community," *Furman* v. *Georgia*, 408 U.S. 238, 450 (1972) (Powell, J., dissenting), Stephens, in his current verified petition, included evidence that his own jury, comprised of twelve white men, was drawn from venires that systematically underrepresented blacks by 16.5% and women by 43.45%.

At an evidentiary hearing, Stephens could provide anecdotal evidence showing that the City of Cochran, the site of his trial, had a long history of racism. For example, evidence in *Kelsey* v. *Killebrew,* Civ. No. 78-33-MAC (M.D. Ga. consent decree entered March 18, 1982), consisting primarily of responses to requests for admission, proved that Cochran's black residents were denied basic public services which were provided to Cochran's white residents. One deponent, Reverend E.K. Hall, testified most tellingly about various city services, citing as examples that a police officer had been dismissed for refusing to bring unsupported charges against a black, that few blacks were employed by the city, that the city maintained segregated public restrooms until 1979, that no blacks were employed at the courthouse, and that the absence of black registrars made blacks afraid to register to vote. Hall deposition at 24, 51, 52. Describing services to blacks in general, Hall concluded: "It's an old trend that blacks are last served, last considered. . . . and the conditions speak for itself in the poor sections. . . . It's felt that black folks can get along without this and without that." Hall deposition at 27-28.

In a separate action, the district court found that the conditions and operating procedures of the Bleckley County jail constituted cruel and unusual punishment in violation of the eighth amendment. *Kelsey* v. *Holder,* Civ. No. 79-196-MAC (M.D. Ga. consent decree entered November 21, 1979). Evidence during the case showed that Sheriff Coley, who was the investigating officer and a witness at Stephens' trial, as well as the custodian of the trial jurors, supervised the beating of prisoners at the Bleckley County jail.

The issues presented in *Stephens* have long been of concern to this Court,[6] and have recently and repeatedly been

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[6] *Furman* v. *Georgia,* 408 U.S. 238, 256 (1972) (Douglas, J., concurring) ("a law that in practice is applied sparsely, selectively, and spottily to unpopular groups . . . has no more sanctity than a law which in terms provides the same"); *id.* at 449 (Powell, J., dissenting) ("If a Negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established"); *see Godfrey* v. *Georgia,* 446 U.S. 420, 439 (1980) (Marshall, J., concurring) ("The disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences").

faced by courts inside and outside the Eleventh Circuit.[7] The admissibility of the Baldus Study was considered by the en banc Eleventh Circuit in *Spencer* v. *Zant*, 715 F.2d 1562 (11th Cir. 1983), *reconsideration en banc stayed*, 729 F.2d 1293 (11th Cir. 1984), on January 17, 1984, and Stephens submitted an amicus brief in support of Spencer, the petitioner. On March 28, 1984, the Eleventh Circuit on its own motion stayed its decision in *Spencer* until it could consider en banc the appeal in *McCleskey* v. *Zant*, 580 F. Supp. 338 (N.D. Ga.), *hearing en banc granted*, 729 F.2d 1293 (11th Cir. 1984), and *Ross* v. *Hopper*, 716 F.2d 1528 (11th Cir. 1983), *reh'g en banc granted*, 729 F.2d 1293 (1984). *McCleskey* not only raises essentially the same claims as *Spencer* and *Stephens*, but also includes as part of its record an evidentiary hearing assessing the statistical evidence of race discrimination similar to the evidence that the petitioners in *Spencer* and *Stephens* were denied an opportunity to present. *McCleskey* and *Ross* were argued en banc on June 12, 1984, and are pending decision by the Eleventh Circuit.

This Court has previously ensured that important questions raised in closely related cases could be reviewed at the same time. Thus, at the start of its October 1952 Term, this Court recognized that the several school desegregation cases that had reached this Court presented similar issues, and the Court adjusted its schedule "to the end that the arguments may be heard together." *Brown* v. *Board of Education*, 344 U.S. 1, 2 (1952) (per curiam). Additionally, the Court took judicial notice that another school desegregation case, *Bolling* v. *Sharpe*, was pending oral argument before the District of Columbia Circuit, and expressly invited a petition for writ of certiorari in that case. *Id.* The petition was subsequently presented and granted to allow oral argument in *Bolling* immediately following the arguments in the other school desegregation cases. 344 U.S. 873 (1952).

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[7] *See, e.g., Shaw* v. *Martin*, 733 F.2d 304 (4th Cir. 1984) (refusing to determine constitutionality of the application of South Carolina death statute because specific statistical evidence was flawed); *cf. Adams* v. *Wainwright*, 734 F.2d 511, 512 (11th Cir.) ("The only thing we can say with confidence is that the state of the law with respect to these issues is unsettled"), *motion to vacate stay granted*, U.S. , 104 S. Ct. 2183 (1984).

Brown and its companion cases involved racial discrimination in public education. Thirty years later the courts in *Stephens*, *Spencer*, *McCleskey*, and *Ross* are being asked to consider the issue of racial discrimination in the judicial process: Has the underlying assumption of *Gregg* been borne out in practice, or do arbitrary, freakish, and discriminatory factors still play a role in the imposition of death sentences?

The role of statistical evidence in proving eighth and fourteenth amendment death penalty claims, and the related questions of what supplemental evidence may be required, are currently pending before the Eleventh Circuit en banc in *Spencer*, *McCleskey*, and *Ross*, and before this Court in *Stephens*. As this Court commences its October 1984 term, it should grant certiorari in *Stephens* to resolve the increasingly pressing race discrimination issues raised by this case. When the Eleventh Circuit renders its decisions in *Spencer*, *McCleskey*, and *Ross*, this Court should invite petitions for writ of certiorari, as appropriate, in those cases, so that these vital issues may be resolved without delay.

Point III

THE DENIAL OF HABEAS RELIEF TO STEPHENS IS THE RESULT OF A LACK OF CLEAR STANDARDS FOR DETERMINING WHEN A SUCCESSOR PETITION CONSTITUTES AN ABUSE OF THE WRIT

Stephens' current habeas petition is his second effort to obtain federal habeas relief from his death sentence. As detailed in his petition for writ of certiorari, the denial of Stephens' habeas petition based on the abuse of the writ doctrine, despite his assertion of four commonly recognized justifications for his prior omission of his current claims, represents a departure by the Eleventh Circuit from well-settled principles of federal habeas jurisprudence. Moreover, recent decisions provide sharp illustrations of the inability of the Eleventh Circuit to identify definitive guidelines for abuse of the writ determinations.

In *Ford* v. *Strickland*, 734 F.2d 538 (11th Cir.), *motion to vacate stay denied sub nom. Ford* v. *Wainwright*, U.S. , 52 U.S.L.W. 3873 (May 31,1984), the Eleventh Circuit granted a stay of execution to a death-sentenced petitioner to

allow further consideration of two constitutional claims. The court admittedly strained to reconcile recent abuse of the writ decisions, especially the decisions rendered in expedited capital cases, including *Stephens*. The Eleventh Circuit stated:

> Our effort to faithfully apply the principles enunciated by the Supreme Court is unusually difficult in these cases. Because of time constraints under which these issues invariably arise, both this court and the Supreme Court have found it impossible in some cases to write an opinion providing a rationale for the decision.

Id. at 541. Moreover, the Eleventh Circuit was apparently not wholly successful in its attempt to decipher recent precedent. This Court, by a widely divided vote, upheld the *Ford* stay on only one of the two grounds cited by the Eleventh Circuit. U.S. , 52 U.S.L.W. 3873 (1984) (Powell, White & Blackmun, J.J., concurring to continue stay on insanity issue only); *id.* (Stevens, J., concurring to continue stay on insanity issue and to express "the view that it is unnecessary to consider the discrimination claim"); *id.* (Brennan & Marshall, J.J., joining in the order of the Court); *id.* (Burger, C.J., Rehnquist & O'Connor, J.J., dissenting). The *Ford* decisions are not alone in seeking to discern the current abuse of the writ standard from sometimes contradictory precedents.[8]

Cases decided since the Eleventh Circuit *Stephens* decision demonstrate not only the growing confusion, furthered by *Stephens*, in applying the abuse of the writ doctrine, but also the increasingly frequent and critical role this doctrine plays in capital cases. *See, e.g., Woodard* v. *Hutchins*, 104 S. Ct. 752 (1984). The record in Stephens' case provides this Court with an ideal opportunity to clarify the guidelines for the abuse of the writ doctrine.

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[8] *See, e.g., Adams* v. *Wainwright*, 734 F.2d 511 (11th Cir.) (stay of execution granted), *motion to vacate stay granted*, U.S. , 104 S. Ct. 2183 (1984); *Moore* v. *Zant*, F. Supp. (S.D. Ga.) (petition dismissed and stay of execution denied based on abuse of the writ), *aff'd*, 734 F.2d 585 (11th Cir.) (Kravitch, J., dissenting), *reh'g en banc granted*, F.2d (June 20, 1984).

CONCLUSION

For the reasons stated in his petition for writ of certiorari, Stephens reasserts that this Court should grant certiorari in his case to consider the several vital issues it raises. Because the clearly erroneous procedural barrier imposed by the Eleventh Circuit's "culpable admissions" standard deprived Stephens of an opportunity even to present his ineffective assistance claim either as a justification for omissions from his prior habeas petition or as a substantive ground for habeas relief, Stephens requests, in the alternative, that this Court grant his petition for certiorari to vacate the Eleventh Circuit's decision and to remand for further consideration of his claims.

Respectfully submitted,

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